IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5048 OF 2001

Jasi D. Bhatena & ors. ... Petitioners

V/s

Dr. Goolcher, daughter of Khurshedji Mehta and wife of K.P.Vishwanatha and ors. ... Respondents

Mr. P.K. Dhakephalkar with Niranjan Shimpi for the petitioners.

Mr. K.P. Vishwanathan present in person on behalf of the respondents.

CORAM: P.V. KAKADE, J.

DATED: 3RD MARCH, 2006

ORAL JUDGMENT:

1. The petitioners have preferred this petition against the order passed by the lower appellate Court dated 23.7.2001 allowing the Revision Petition No. 127 of 1999 in Execution Application dated 16.6.1999 in Appeal No. 272 of 1978, whereby order of the Execution Court dated 8.9.1999 dismissing the execution application was set aside and it was directed that the execution of the decree in question shall proceed in terms of prayer made

in the said application.

2. I have heard the learned counsel for the petitioners as well as Mr. K.P. Vishwanathan, legal representative of Dr. Goolcher on behalf of the respondents.

3. Before going to the impugned order, it would be just and proper on my part to have a glimpse of factual back ground of the dispute which date backs to over last 40 years.

The subject matter of the petition is the Flat No.2 on the ground floor of Billimoria Building, 27A, Plot No.4, Sleater Road, Grant Road, Mumbai. It was originally owned by Mrs. Pirojabai Dhunjishaw Jamashedji and one Dr. Barjor K. Mehta was the contractual tenant of the said flat. Said Dr. Mehta was bachelor who died in the year 1959 while residing in the said flat. He left behind his heirs under the law applicable to the Parsees i.e. one brother Jal, 5 sisters - Sunabai P. Printer, Mrs. Dinabai D. Kotwal, Mrs. Jerbanoo B. Gandhi, Mrs. Alu D. Goregaonwala, Miss Gulcher K. Mehta and one Nariman N. Kapadia - son of the pre-deceased sister. Subsequently, the Attorney M/s. Aibara & Co. acting for one Adi Gandhi - son of Jerbanoo i.e. one of

the sisters of the deceased Dr. Mehta claimed by their letter dated 15.5.1959 that said Adi was appointed as Executor by deceased Dr. Mehta and stated that said Adi proposed to open the residence of the deceased in presence of Dr. (Miss) Goolcher and other sisters. It was the case of Dr. (Miss) Goolcher that the said letter reached her late. Inventory was accordingly made. Subsequently, the landlady i.e. Pirojabai came to the premises and pasted on the door a letter dated 4.6.1959 calling upon the heirs of the respondents to vacate the premises and pay arrears of rent. One Adi D. Gandhi also claimed at the relevant time that he was tenant of the suit premises under Sec. 5(11)(c) of the Bombay Rent Act.

One of the sisters of the deceased, one Jerbanoo filed a petition in the High Court bearing Petition No. 504 of 1959 for letters of administration. Dr. Goolcher K. Mehta who had applied for letters of administration expired on 25.9.1960 and the said proceedings for letters of administration were not proceeded any further. Dr. Goolcher filed a fresh petition for letters of administration to the estate of the deceased. In that petition on 6.10.1959 the plaintiff filed a caveat alongwith an affidavit objecting to the letters

of administration being granted to her. The said petition was converted into a suit. Shortly afterwards, the said Attorney for Adi Gandhi wrote to the landlady informing that they would surrender their tenancy of the premises by 31.10.1959. Accordingly, as the said proceedings for letters of administration to the estate of the deceased were pending, said Adi and his mother Jerbanoo surrendered the suit premises to the landlady who accepted the same. Subsequently, the landlady, acting through a broker created a tenancy of the suit premises in favour of original defendant No.2 and defendants 2A and 2B who are petitioners in Writ Petition No. 1382 of 1981. It is to be noted that, in the meantime, said Jerbano who had applied for letters of administration expired on 25.9.1960 and said proceeding for letters of administration were not proceeded any further. Therefore, heirs of original tenant surrendered the premises on 31.10.1959 and in 1959 itself the tenancy was created in favour of D.H. Bhatena and J.D. Bhatena and N.D. Bhatena.

4. On 14.11.1962 Dr. Goolcher filed a fresh petition for letters of administration to the estate of the deceased being Petition No. 18 of 1962 and the same was granted to her on 20.7.1966. It is to be noted that

initially in the schedule of the estate, the tenancy right of the suit premises was not included, however, after the letters of administration were granted to the plaintiff, the said schedule was allowed to be amended by the Court and the tenancy rights were included in the schedule of the petition.

5. On 6.10.1966, said Dr. Goolcher filed R.A. Declaratory Suit No. 722/6106 of 1966 for possession of the suit premises alleging that she is holder of letter of administration to the estate of deceased and in her capacity as the administrator of the estate. Originally, the suit was filed against the landlady i.e. Pirojabai, then fresh tenants D.H. Bhatena and then Adi Gandhi who was the heir of Dr. Burjor Mehta had surrendered the tenancy. The suit was dismissed by the trial Court.

The writ petition came to be filed in this Court being Writ Petition No. 1382 of 1981 which was filed by the tenant, D.H. Bhatena, heir and also a Writ Petition No. 1880 of 1981 was filed by Mrs. Pirojabai, the original owner of the premises.

6. On 10.1.1983 both petitions were dismissed.

However, the Court observed that the plaintiff would be entitled to decree for possession but the same would be subject to 1/8 share of Jerbanoo in the said tenancy right which had been validly surrendered by her to the landlady Pirojabai and who in turn created tenancy in favour of D.H. Bhatena. The order of the appellate Court decreeing the suit was confirmed, however, subject to a variation that the decree in favour of the plaintiff would be subject to the rights of D.H. Bhatena, since deceased, his heirs and legal representatives and Jasi Bhatena and Noshir Bhatena and subject to the rights of the heirs of late Dr. Burjor K. Mehta including the 1/8 share of said Dr. Goolcher.

7. It appears that one Civil Application No. 514 of 1983 was filed for review by one K.P. Vishwanathan, the husband of Dr.Goolcher, who is prosecuting this petition as legal representative of Dr. Goolcher. While the said review application was pending, said K.P. Vishwanathan filed another application bearing Civil Application (Stamp) No. 14135 of 1997 for amendment in which it was claimed that the original landlady Pirojabai had sold the entire Billimoria building wherein the suit premises was situated to one Clover Co-operative Housing Society which was formed by the

then existing tenants of the building. It was further claimed that the said sale was made on 16.7.1981 and thus D.H. Bhatena, J.D. Bhatena and N.D. Bhatena were in possession of the premises as tenants purchased the premises for Rs.9000/-. It was prayed that these persons be directed to hand over the possession of the suit premises to K.P. Vishwanathan. It appears that this Court rejected the said review application on 1.8.1997 after 14 years of its filing. Thereafter it appears that said Vishwanathan filed an application for execution on 16.6.1999 in the Small Causes Court for execution of the decree dated 20.10.1982. In the title of the application for execution, the names of the parties which were mentioned were the original owners of the premises and the original transferee tenant and his heirs. However, in respect of the decree against whom it should be executed, the name of the Chairman of the Clover Co-operative Housing Society and the names of Kanta Mepani and Kirti Mepani were mentioned for issuance of warrants of possession claiming that they are transferees pendente-lite.

The record further showed that when the matter for execution of the decree came up for hearing before the execution Court, the petitioners were not served and

were not even aware of the execution proceedings. The learned Judge dismissed the application for execution of the decree on the ground that the respondent Nos. 5, 6 & 7 were not parties to the writ petition and Appeal No. 272 of 1978 and the Court also refused to come to a conclusion that there was nothing on record to show that on 16.7.1981 as claimed by the decree holder, the premises were transferred to respondent Nos. 5, 6 & 7 and, therefore, the application for decree under Order 21 Rule 11 came to be dismissed. It was carried in the revision. The revisional Court, however,came to the conclusion that the decree was executable and allowed the review petition. Hence the present petition.

8. I have critically perused the submissions furnished by Mr. Vishwanathan who is appearing as legal representative of Dr. Goolcher.

9. At the outset, it may be noted that this petition can be very well disposed of only on one point, namely, that the application for execution appears to be barred by law of limitation. It is evident that both the writ petitions namely 1382 of 1981 as well as 1880 of 1981 came to be dismissed by this Court on 10.1.1983. Thereafter review application appears to be filed by Mr.

K.P. Vishwanathan bearing No. 514 of 1983 which remained pending till the year 1997 and ultimately was dismissed on merits by this Court. On the basis of this aspect, the revisional Court has found that since the review petition was pending till the year 1997 and the execution application was filed in the year 1999 i.e. within two years of dismissal of review petition, the execution petition is within limitation and not barred by Art. 136 which would govern the issue. I prefer to disagree with this proposition which is obviously erroneous. There is no doubt whatsoever that the suit filed by Dr. Goolcher for declaration i.e. R.A.D. Suit No. 722/6106 of 1986 was dismissed by the Trial Court, however, the appellate Court decreed the suit and writ petitions which were filed came to be ultimately disposed of finally on merits in the year 1983. Under the circumstances, even if we accept the doctrine of merger, the limitation period would commence from the date of appellate Court decree i.e. when ultimately the matter was set at rest by the order passed by this Court in the year 1983. However, by any stretch of imagination, it cannot be said that the doctrine of merger would be applicable to the review application which was filed in the year 1983 and was ultimately dismissed in the year 1997. The Supreme Court in the

case of **Laxman Govinda & ors. v/s Dagdu Shripati Satale & ors., reported in A.I.R. 1954 Bom. 457** has settled this issue. Art. 182(3) of the Limitation Act 1908 (old Act) was under consideration. Justice Gajendragadkar speaking for the Bench observed thus -

> "The clause "where there has been a review of judgment" is intended to refer only to such cases where in fact there has been a review of the judgment and it does not cover infructuous proceedings taken by a party for the purpose of obtaining the relief of such review. Therefore, Art. 182(3) is intended to be applied only to such cases where the application for review has succeeded and a decision in favour of the party asking for review has been passed. All other cases are no doubt cases where there has been an attempt at obtaining an order for review of the judgment, but Cl.(3) is not intended to cover all proceedings taken by parties with a view to obtain a review of judgment."

Under the circumstances, it must be noted that fate would have been different in this case if the review

application was ultimately allowed by this Court in the year 1997. However, the facts on record show that said review application was ultimately dismissed and, therefore, it must be held that said dismissal of the review application would not be of any help to bring the proceeding within the limitation contemplated under Art. 136 of the Limitation Act, 1963.

10. Therefore, on this count alone the petition deserves to be allowed holding that the execution application is barred by limitation and, therefore, cannot be enforced.

In view of this position, the other aspects involved in the dispute are rendered infructuous and need not be addressed at all.

11. In view of this position, the Rule is made absolute.

Petition is allowed in terms of prayer clause (a) and stands disposed of with no order as to costs.

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